UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ARTHUR EASTMAN, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Civil No. 95-255-P-C***
	)	
BRUNSWICK COAL & LUMBER	***)***	
COMPANY, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS TO DISMISS AND DEFENDANT NOONAN'S MOTION TO STRIKE JURY DEMAND

This action arises out of the defendants' alleged discharges of diesel oil, gasoline and other hazardous and toxic substances onto the plaintiffs' property and into the Ossipee River. The plaintiffs assert claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*; the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*; the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*; and the Declaratory Judgment Act, 28 U.S.C. § 2201. They also assert sixteen state-law claims. The defendants move to dismiss the plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Defendant J.P. Noonan Transportation, Inc. ("Noonan") also moves to strike the plaintiffs' demand for a jury trial as to their federal claims. For the reasons set forth below, I recommend that the defendants' motions to dismiss be granted in part and denied in part, and I grant Noonan's motion to strike.

I. The Plaintiffs' Allegations

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendants are entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Accepting the allegations in the complaint as true for purposes of the Rule 12(b)(6) motions to dismiss, the relevant facts as asserted by the plaintiffs may be summarized as follows. The plaintiffs, Arthur and Wanda Eastman, own property in Porter, Maine. First Amended Complaint ("Complaint") (Docket No. 2) ¶ 10. The property adjoins Route 25 and lies near the Ossipee River, a navigable water of the United States. *Id.*

On May 15, 1986 a tractor-trailer owned by Defendant Brunswick Coal & Lumber Company ("Brunswick") and operated by defendant Downeast Energy Corp. ("Downeast") on Route 25 was carrying approximately 7,000 gallons of No. 2 diesel fuel. *Id.* ¶¶ 10-11. The tractor-trailer overturned on a curve bordering the plaintiffs' property and the tank-trailer split open upon impact, releasing its contents into the environment and onto the plaintiffs' property. *Id.* ¶¶ 10, 12. The diesel fuel immediately soaked into the soil underlying the plaintiffs' property and was discharged into the Ossipee River less than 100 feet from the release. *Id.* ¶ 13.

The Maine Department of Environmental Protection ("DEP") responded to the accident and contacted Downeast. *Id.* DEP hired Clean Harbors, Inc. to perform emergency response cleanup

activities at the accident site, with the concurrence and oversight of Downeast and Brunswick representatives. *Id.* ¶ 14. Nevertheless, over 1,000 gallons of the diesel fuel were left in the soil and groundwater beneath the plaintiffs' property when DEP terminated its emergency response activities. *Id.* ¶ 16.

On or about August 17, 1990 a tractor-trailer owned and operated by Noonan overturned at approximately the same location as the May 15, 1986 accident. *Id.* ¶ 19. Noonan's tractor-trailer exploded on impact, causing an intense fire and releasing approximately 2,000 to 10,000 gallons of unleaded gasoline into the soil and groundwater underlying the plaintiffs' property. *Id.* ¶¶ 20-21. Local fire departments responded to extinguish the fire. *Id.* ¶ 21. Toxic and hazardous materials were produced by the incomplete combustion of plastics, synthetics, metals and fluids comprising Noonan's tractor-trailer, and the unleaded gasoline it was carrying. *Id.* ¶ 22. These materials were released into the soil and groundwater beneath the plaintiffs' property. *Id.* ¶ 23.

Noonan retained a cleanup contractor to perform an emergency response cleanup. *Id.* ¶ 24. However, Noonan instructed the contractor to discontinue its activities before it had thoroughly cleaned up the toxic and hazardous materials. *Id.* ¶ 25. DEP ordered Noonan to undertake a program of periodic sampling and analytical analyses, but Noonan failed to fully perform the required program and thus is in violation of the DEP order. *Id.* ¶¶ 28-29.

The plaintiffs retained an environmental consulting firm, Sebago Technics, Inc. ("STI"), to conduct a preliminary site assessment and determine whether the soil and groundwater beneath their property are still contaminated. *Id.* ¶ 30. Laboratory analysis of groundwater samples revealed the presence of benzene, toluene and xylene. *Id.* ¶ 32. Surface and subsurface soil samples exhibited petroleum odors, and a sheen was visible on the surface of the Ossipee River. *Id.*

II. Legal Analysis

A. Count II (CWA)[1]

The CWA makes it unlawful for a person to discharge pollutants from a point source into navigable waters of the United States without obtaining and complying with the terms of a pollution discharge permit. *See* 33 U.S.C. §§ 1311(a), 1342(a), 1362(12)(A); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1310-11 (2d Cir. 1993). A citizen may bring a civil action against any person alleged to be in violation of an "effluent standard or limitation," which is defined to include any action declared unlawful under section 1311(a). 33 U.S.C. § 1365(a)(1), (f)(1); *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1311. A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[2] 33 U.S.C. § 1362(14). A citizen action under the CWA is prospective only, and thus requires either a continuous or intermittent violation. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57-59 (1987); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 45 (D. Me. 1994).

Although the complaint does not specify the alleged point source, a fair reading of the

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[1] Despite Noonan's argument to the contrary, this court has subject matter jurisdiction over the plaintiffs' CWA claims pursuant to 33 U.S.C. § 1365(a), although the plaintiffs did not specifically cite that section. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1210 at 121 (1990) ("Wright & Miller") ("reference to . . . an erroneous basis of jurisdiction will be corrected by the court if it can determine the appropriate statute or jurisdictional source from the complaint").

[2] Although this definition was amended in 1987, Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 1987 U.S.C.C.A.N. (101 Stat.) 7, 75, the amendment did not alter the quoted language and is not relevant here.

complaint allows for only one possibility: the tractor-trailers from which the fuel was spilled. The plaintiffs attempt, in their Consolidated Objection ("Plaintiffs' Objection") (Docket No. 8) to the defendants' motions, to restyle their complaint by identifying two wells as the alleged point sources.[3] However, the complaint cannot be read to contain such an allegation. In their CWA claims the plaintiffs assert that:

> 58. [re May 15, 1986 discharge] . . . The tractor trailer . . . overturned on Plaintiffs' property, rupturing the tank resulting in the unpermitted discharge and release of No. 2 diesel oil . . . . Approximately 7,000 gallons of oil discharged onto the surface of the Plaintiffs' property, the Route 25 road surface and into the Ossipee River, causing an oil sheen and slick on the surface of the Ossipee River.
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> 59. Due to Defendants Downeast Energy and Brunswick Coal & Lumber's failure to thoroughly cleanup and remediate all of the . . . diesel fuel that was discharged . . . , an oil sheen or discoloration of the surface of the Ossipee River continues to periodically appear. *The source of the discharge was and is a point source* within the meaning of 33 U.S.C. § 1362(12).
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> 60. [re August 17, 1990 discharge] . . . The tractor trailer . . . overturned on Plaintiffs' property, rupturing the tank resulting in the unpermitted discharge of unleaded gasoline . . . . Approximately 2,000 to 10,000 gallons of gasoline discharged onto the surface of the Plaintiffs' property, the Route 25 road surface and into the Ossipee River, causing an oil sheen and slick on the surface of the Ossipee River. Due to Defendant J.P. Noonan's failure to thoroughly cleanup and remediate all of the . . . unleaded gasoline that was discharged . . . , an oil sheen or discoloration of the surface of the Ossipee River continues to periodically appear. *The source of the discharge was and is a point source* within the meaning of 33 U.S.C. § 1362(12).

Complaint ¶¶ 58-60 (emphasis added). The only discharges mentioned before the emphasized language were the discharges of fuel from the tractor-trailers.[4] Thus, the "source of the discharge,"

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[3] Clean Harbors, Inc. allegedly built these wells on Noonan's behalf, as part of a "limited groundwater pump-and-treat remedial action." August 31, 1992 Sebago Technics, Inc. Report ("STI Report") at 3, Exh. 1-4 to Complaint (incorporated by reference in Complaint ¶ 31).

[4] Moreover, the plaintiffs' allegations concerning the monitoring and extraction wells in no way suggest that they are point sources: "These remaining monitoring and extraction wells, are of (continued...)

Complaint ¶¶ 59-60, can only refer to the defendants' tractor-trailers, rather than the wells.[5]

As stated above, a CWA citizen action is prospective only, and thus requires either a continuous or intermittent violation. The plaintiffs allege that the defendants are engaged in "continuing unpermitted discharge of oil" into the Ossipee River. Complaint ¶ 61. However, it is not enough merely to recite the word "continuing"; the plaintiffs must make a "good faith" allegation that the defendants are in a state of continuous or intermittent violation. *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1311. A state of continuous or intermittent violation exists when there is a "reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57; *see Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1311.

The plaintiffs claim to have satisfied this requirement by alleging "[t]hat a discharge at least intermittingly continues to occur." Plaintiffs' Objection at 18 (citing Complaint ¶ 59 (alleging that an oil sheen continues to periodically appear on the Ossipee River)). But a continuous or intermittent violation of the CWA requires more than a continuous or intermittent discharge; there must be a continuous or intermittent discharge *from a point source*. Here the only alleged point

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[4] (...continued)
unknown construction; were not secured by [Noonan] against vandalism and are such an eyesore as to constitute a continuing public and private nuisance that has stigmatized and continues to stigmatize Plaintiffs' property and diminish its value." Complaint ¶ 27. Rather than suggest that the wells are point sources for purposes of the CWA claims, the plaintiffs include the wells as part of their nuisance (Count XIII) and negligent infliction of emotional harm (Count XV) claims against Noonan. *Id.* ¶¶ 126, 132.

[5] Even if the plaintiffs had attempted to allege the wells as point sources, their CWA claim would fail. Nothing in the complaint supports an inference that the wells are likely to discharge pollutants as required by 33 U.S.C. § 1362(14). In their complaint, the plaintiffs incorporate a report prepared by STI, an environmental consulting firm that the plaintiffs themselves hired. Complaint ¶ 31. According to the complaint, the wells are made of solid pipe containing no slotted sections, STI Report at 5, thus eliminating any suggestion that contaminants in the near-surface soil could infiltrate the well, spread to the groundwater and ultimately reach the Ossipee River.

sources are the defendants' tractor-trailers. The plaintiffs have not alleged a reasonable likelihood that the defendants' violations (i.e., discharges from the tractor-trailers) will continue into the future. Indeed, they could not make such an allegation unless the tractor-trailers were still on the plaintiffs' property, which they have not alleged. Accordingly, I recommend that Count II be dismissed.[6]

B. Count III (RCRA)

RCRA's citizen suit provision allows private parties to assert civil claims against "any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." 42 U.S.C. § 6972(a)(1)(A). Parties may also bring citizen suits against "any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* § 6972(a)(1)(B).

1. Statute of Limitations

Brunswick and Downeast argue that the RCRA claims against them are time-barred. RCRA does not contain a statute of limitations on citizen suits. "When Congress fails to furnish an express statute of limitations in connection with enforcement of a federal right, a court's initial look must be to state law to isolate the most closely analogous rule of timeliness." *Posadas de Puerto Rico Assocs., Inc. v. Asociacion de Empleados de Casino de Puerto Rico*, 873 F.2d 479, 480 (1st Cir.

[6] I need not consider the defendants' additional arguments that there is no right to recover damages in a CWA citizen suit and that the plaintiffs' CWA claims are time-barred as to defendants Brunswick and Downeast.

1989). However, where state limitation periods "frustrate or interfere with the implementation of federal policies," courts may borrow a "significantly more appropriate" federal limitation period that provides a "closer analogy" than the state periods. *See id.* at 480-81. The only limitation periods cited by the parties are the five-year federal statute of limitations found at 28 U.S.C. § 2462, and Maine's six-year statute of limitations on civil actions, 14 M.R.S.A. § 752. I need not decide between these two limitation periods because the plaintiffs filed their complaint over nine years after the May 15, 1986 accident involving Brunswick and Downeast.[7]

The plaintiffs argue that the continuing nature of the defendants' violations saves their RCRA claims from being time-barred. However, I must examine the nature of the plaintiffs' claims to distinguish between continuing violations and the mere continuing impact of past violations. *See United States v. Telluride Co.*, 884 F. Supp. 404, 408 (D. Colo. 1995) (continuing impact from past discharge in violation of CWA does not constitute continuing violation; five-year limitation period in 28 U.S.C. § 2462 began to run at time of discharge); *cf. Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990) (under Title VII continuing violation theory, "courts must be careful to differentiate between discriminatory acts and the ongoing injuries which are the natural, if bitter, fruit of such acts").

In their claims under 42 U.S.C. § 6972(a)(1)(B) the plaintiffs allege that Brunswick and Downeast disposed of, stored, handled and treated solid or hazardous waste. Complaint ¶¶ 68-71.

[7] There is no statute of limitations defense available to Noonan, for even if the five-year federal limitation period applies, the plaintiffs commenced this action within five years of Noonan's December 17, 1990 accident.

With the exception of the handling,[8] this alleged conduct occurred on the date of the accident, May 15, 1986. Thus, the plaintiffs' section 6972(a)(1)(B) claims accrued on that date. *See United States v. Meyer*, 808 F.2d 912, 914 (1st Cir. 1987) (in action subject to 28 U.S.C. § 2462 limitation period, claim accrues when suit may be maintained thereon); *Kelleher v. Boise Cascade Corp.*, 676 F. Supp. 22, 24 (D. Me. 1988) (under Maine law, claim generally accrues when plaintiff sustains judicially cognizable injury). The imminent and substantial endangerment posed by the continued presence of waste does not transform the 1986 discharge into a continuing RCRA violation.[9] *See Telluride*, 884 F. Supp. at 408; *cf. Dugan v. Martel*, 588 A.2d 744, 746 (Me. 1991) (continuing leakage of cellulose dust, allegedly caused by negligent installation, did not extend Maine's six-year limitation period). Accordingly, the plaintiffs have not alleged continuing RCRA violations on the part of Brunswick and Downeast, and their section 6972(a)(1)(B) claims against them are time-barred.[10]

2. 42 U.S.C. § 6972(a)(1)(A)

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[8] The plaintiffs allege that "[t]he incomplete cleanup and removal of the chemicals, petroleum, gasoline and No. 2 diesel fuel by [the defendants] or their agents constitutes handling of solid or hazardous waste under RCRA. Complaint ¶ 70. The plaintiffs, however, have not argued that this alleged handling constitutes a continuing RCRA violation by Brunswick and Downeast.

[9] The plaintiffs suggest that "this Court has held that a citizen suit under [42 U.S.C. § 6972(a)(1)(B)] *does* reach *past* conduct from which *continuing* releases of pollution continue to occur." Plaintiffs' Objection at 22 n.16 (citing *Murray*, 867 F. Supp. at 41). The cited portion of Murray, however, dealt only with section 6972(a)(1)(B)'s requirement that the waste present an "imminent and substantial endangerment," not with extending the limitation period. *Murray*, 867 F. Supp. at 41.

[10] In contrast, to the extent that the plaintiffs may state claims under 42 U.S.C. § 6972(a)(1)(A), they have alleged continuing violations because the claims assert ongoing violations of a permit, standard, regulation, condition, requirement, prohibition or order in effect pursuant to RCRA. *See* 42 U.S.C. § 6972(a)(1)(A).

a. Defendant Noonan

Noonan argues that the plaintiffs have not alleged a violation of any permit, standard, regulation, condition, requirement, prohibition or order in effect under RCRA, as required by section 6972(a)(1)(A). In response, the plaintiffs assert that Noonan is in violation of an order issued by DEP. This alleged order is a December 17, 1990 letter from DEP to Noonan, which requires Noonan to sample and analyze the groundwater at the plaintiffs' property and visually inspect the Ossipee River adjacent to the spill area for petroleum. December 17, 1990 DEP Letter to Noonan ("DEP Letter"), Exh. 1-3 to Complaint (incorporated by reference in Complaint ¶ 28). The plaintiffs allege that Noonan has yet to fully comply with these requirements. Complaint ¶ 29.

Noonan argues that, even if this letter constitutes an "order,"[11] in order to prevail under section 6972(a)(1)(A) in the circumstances here the plaintiffs must allege a violation of Maine's own EPA-authorized hazardous waste program. In making this argument, Noonan appears to misread this court's prior holding in *Murray*. An action alleging a violation of RCRA, or regulations in effect thereunder, is unavailable under section 6972(a)(1)(A) "where the applicable federal requirements of RCRA have been superseded by an EPA-authorized state hazardous waste program pursuant to 42 U.S.C. § 6926(b)." *Murray*, 867 F. Supp. at 42.[12] However, a plaintiff may sue under section 6972(a)(1)(A) for violations of the EPA-authorized state program itself, since the program "has

[11] Because Noonan has supplied no argument or authority to the contrary, I treat Noonan as conceding that the letter constitutes an "order" within the meaning of section 6972(a)(1)(A).

[12] As the court noted in *Murray*: "Effective May 20, 1988, Maine received final EPA authorization under 42 U.S.C. § 6926(b) to operate its state hazardous waste management program in lieu of the RCRA hazardous waste program, subject to the limitations imposed by the Hazardous and Solid Waste Amendments of 1984. This authorization, having not been withdrawn, has remained in full effect since that time." *Murray*, 867 F. Supp. at 43 (citations omitted).

become effective" pursuant to RCRA, as required by section 6972(a)(1)(A). *Id.* at 43.

Noonan apparently reads *Murray* as holding that the *only* way to state a claim under section 6972(a)(1)(A), if an EPA-authorized state program is in effect, is to allege a violation of the state program itself. *See* Noonan's Reply at 7. But *Murray* does not suggest that an *order* in effect pursuant to an EPA-authorized state program, which itself is in effect pursuant to RCRA, could not support a section 6972(a)(1)(A) claim.[13] Here, that is precisely what the plaintiffs have alleged: that by failing to fully perform the sampling and analysis required by DEP, Noonan "is in violation of a direct order of" DEP. Complaint ¶ 29. Accordingly, I recommend that Noonan's motion to dismiss the plaintiffs' section 6972(a)(1)(A) claim be denied.

b. Defendants Brunswick and Downeast

Defendants Brunswick and Downeast also argue that the plaintiffs' section 6972(a)(1)(A) claims should be dismissed because the plaintiffs fail to allege that they are in violation of any permit, standard, regulation, condition, requirement, prohibition or order in effect pursuant to RCRA. Here the plaintiffs may not rely on the DEP letter, which applies only to Noonan. Instead, the plaintiffs argue that, "having specifically alleged that Defendants have violated RCRA, . . . the [plaintiffs] can pursue RCRA claims under 42 U.S.C. § 6972(a)(1)(A) as a violation of Maine's program since it 'has become effective' pursuant to RCRA." Plaintiff Eastmans' Consolidated Sur-Reply Memorandum (Docket No. 12) at 3. In this regard, the plaintiffs rely on DEP Regulation 850.1, which states: "This rule . . . is intended to be consistent with applicable requirements of The

[13] Noonan has not argued that the order is not in effect pursuant to Maine's hazardous waste program, or that the order must be in effect pursuant to RCRA itself rather than the EPA-authorized state hazardous waste program.

Solid Waste Disposal Act, as amended by [RCRA], . . . and regulations promulgated . . . thereunder." Me. Dep't of Envtl. Prot. Reg. 850.1. The plaintiffs further argue that RCRA's hazardous waste definitions, 42 U.S.C. §§ 6903(5) and (27), are consistent with the analogous definitions found in Me. Dep't of Envtl. Prot. Reg. 850.3(A)(2) and (3).

The plaintiffs' argument cannot withstand scrutiny. Neither DEP's intent that a state-program rule be consistent with RCRA requirements, nor the similarity of definitions of hazardous waste in the state program and RCRA, can convert a RCRA violation into a violation of Maine's hazardous waste program. To state claims under section 6972(a)(1)(A), the plaintiffs must allege ongoing violations of some permit, standard, regulation, condition, requirement, prohibition or order in effect pursuant to Maine's hazardous waste program, which itself is in effect pursuant to RCRA. *See Murray*, 867 F. Supp. at 43 (plaintiffs stated section 6972(a)(1)(A) claim by asserting that defendant violated federal regulations which state agency had specifically adopted pursuant to EPA-authorized hazardous waste program); *Sierra Club v. Chemical Handling Corp.*, 824 F. Supp. 195, 197 (D. Colo. 1993) (plaintiffs stated section 6972(a)(1)(A) claim by alleging that defendant violated specific provisions of EPA-authorized state hazardous waste program and regulations adopted thereunder). The plaintiffs neither allege such violations in their complaint nor identify them in their memoranda. Accordingly, I recommend that the section 6972(a)(1)(A) claims be dismissed as to defendants Brunswick and Downeast.

3. 42 U.S.C. § 6972(a)(1)(B)

In their memoranda in support of their motions to dismiss, the defendants argue that the plaintiffs have improperly asserted RCRA claims under 42 U.S.C. § 6973, which authorizes the

Administrator of the EPA to bring suit on behalf of the United States. The plaintiffs explain in their Objection that they intended to cite 42 U.S.C. § 6972, which authorizes RCRA citizen suits, rather than section 6973. In their complaint they allege that the defendants' disposal of waste presents "an imminent and substantial endangerment to health and the environment under . . . 42 U.S.C. § 6973." Complaint ¶ 72. The phrase "imminent and substantial endangerment to health or the environment" appears in both section 6972 and section 6973.

In its Reply Brief in Support of Its Motion to Dismiss (Docket No. 11), Noonan argues that the plaintiffs have failed to plead a claim under 42 U.S.C. § 6972(a)(1)(B). The plaintiffs' Objection gave Noonan notice of the error and an opportunity to address the section 6972(a)(1)(B) claims in its reply memorandum, but Noonan elected not to do so. Under these circumstances, I find it inappropriate to dismiss the plaintiffs' section 6972(a)(1)(B) claims. *See Prisco*, 902 F. Supp. at 393 (where complaint supported 42 U.S.C. § 6972(a)(1)(B) claim, but plaintiffs miscited to section 6973, complaint nonetheless set out facts supporting a potential favorable judgment, and RCRA citizen suit was not dismissed); *see also* 5A Wright & Miller § 1357 at 336-37 ("The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.").

4. Equitable Restitution

The plaintiffs seek to recover, in their RCRA claims, "equitable restitution of the costs it [sic] has expended and will continue to expend." Complaint ¶ 72. The defendants argue that the plaintiffs are entitled only to injunctive relief on their RCRA claims. After the parties filed their

respective memoranda, the United States Supreme Court handed down a decision in which it held that "a private party cannot recover the cost of a *past* cleanup effort under RCRA," regardless of whether the costs are pleaded as "damages" or "equitable restitution." *Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. 4135, 4137-38 (U.S. Mar. 19, 1996) (emphasis in original).[14]

The plaintiffs attempt to distinguish their situation from *Meghrig*. The *Meghrig* plaintiffs had already expended full cleanup costs, *see id.* at 4136, whereas the plaintiffs here have not. They seek to recover their past costs of documenting the continuing contamination, and to require the defendants to alleviate the endangerment to health and the environment. Plaintiffs' Objection at 16. Thus, the plaintiffs argue, "[t]heir response costs are more properly classified as costs incurred in their role of private attorney general who fulfilled their good faith obligation to document continuing contamination attributable to Defendants prior to bringing action." *Id.* at 16-17.

The plaintiffs provide no authority for this argument, and the rationale of *Meghrig* refutes it. First, the Court observed that RCRA's primary purpose "is to reduce the generation of hazardous waste and to ensure the proper treatment, storage and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig*, 64 U.S.L.W. at 4136 (quoting 42 U.S.C. § 6902(b)). Next, the Court contrasted the purely injunctive remedies available in RCRA citizen suits, which do not contemplate awarding past cleanup costs, with the cost recovery provisions Congress enacted in CERCLA. *Id.* at 4136-37. Finally, the Court cited the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 4137

[14] *Meghrig* resolved a split between the Eighth and Ninth Circuits over whether private parties could recover past cleanup costs under RCRA, and reversed *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), upon which the plaintiffs had relied. *Meghrig*, 64 U.S.L.W. at 4136.

(quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)). Whether the plaintiffs have expended part or all of the cleanup costs, and whether they are framed as "response" or "documentation" costs, does not change the Court's conclusion. RCRA's citizen suit provision "was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms." *Id.* Accordingly, the plaintiffs are not entitled to recover the equitable restitution requested in their RCRA claims.[15]

C. Counts IV and V (CERCLA)

1. Unopposed Arguments

The plaintiffs' CERCLA claims have drawn from the defendants a flurry of arguments to which the plaintiffs have offered no response. First, in Count V the plaintiffs appear to be asserting claims under 42 U.S.C. § 9604. Complaint ¶ 83. The defendants note that section 9604 authorizes the President to act thereunder, not private parties. 42 U.S.C. § 9604(a), (b). Accordingly, I recommend that the defendants' motions to dismiss Count V be granted.

The defendants next observe that the plaintiffs may not recover injunctive relief under CERCLA. *See* 42 U.S.C. § 9607(a)(4)(A)-(D) (imposing liability for costs only); *New York v. Shore*

[15] Although the RCRA claims seek "equitable restitution of the costs it [sic] has expended *and will continue to expend*," Complaint ¶ 72 (emphasis added), in their Objection the plaintiffs address only their right to recover costs already expended. The defendants, however, argue that the plaintiffs cannot recover *any* monetary damages or equitable restitution because they are entitled, at most, only to injunctive relief. The *Meghrig* Court specifically did not decide "whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced . . . or otherwise recover cleanup costs paid out after the invocation of RCRA's statutory process." 64 U.S.L.W. at 4137. Nevertheless, I treat the plaintiffs as having forgone such an argument.

Realty Co., 759 F.2d 1032, 1049 (2d Cir. 1985) (section 9607 permits only cost claims and does not implicitly authorize non-federal parties to seek injunctive relief). Similarly, as Noonan argues, to the extent the plaintiffs may seek natural resources damages,[16] their claims must be dismissed because such damages are unavailable to private plaintiffs. 42 U.S.C. § 9607(f)(1) (liability for natural resources damages shall be to the United States Government, a State or an Indian tribe). Accordingly, I recommend that Count IV be dismissed to the extent it seeks injunctive relief or natural resources damages.

In Count IV the plaintiffs appear to seek relief pursuant to 42 U.S.C. § 9612, which authorizes private parties to present claims to the Superfund after first presenting such claims to the parties who may be liable under section 9607. 42 U.S.C. § 9612(a). Thus, section 9612 does not provide a private cause of action against the defendants. In Count IV the plaintiffs also appear to rely, in part, on 42 U.S.C. § 9659. As Noonan correctly argues, to state a claim under section 9659 the plaintiffs must allege that the defendants are in violation of some standard, regulation, condition, requirement or order in effect pursuant to CERCLA, which the plaintiffs have not done. 42 U.S.C. § 9659(a)(1). Accordingly, I recommend that Count IV be dismissed to the extent that it attempts to state a claim pursuant to 42 U.S.C. § 9612 or 42 U.S.C. § 9659.

The plaintiffs rely upon one more section of CERCLA in Count IV, 42 U.S.C. § 9607, which does provide a private right of action. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889

[16] Persons covered under CERCLA section 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4), are liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury." 42 U.S.C. § 9607(a)(4)(C).

F.2d 1146, 1150 (1st Cir. 1989).[17] In response, the defendants advance yet another argument for dismissal, which I consider next.

2. The Petroleum Exclusion

The defendants argue that the plaintiffs' CERCLA claims are barred by CERCLA's so-called "petroleum exclusion." CERCLA's definition of "hazardous substance" excludes petroleum. 42 U.S.C. § 9601(14). A petroleum product is exempt from CERCLA even though certain of its indigenous components and certain additives introduced during the refining process are themselves designated as hazardous substances. *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 810 (9th Cir. 1989). The exclusion does not apply, however, where such indigenous components are found in excess of the amounts that would have resulted from the refining process, or where hazardous substances are added to or mixed with a petroleum product during or after use. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266-67 (3d Cir. 1992); *Washington v. Time Oil Co.*, 687 F. Supp. 529, 531-32 (W.D. Wash. 1988).

The plaintiffs allege that the following "[h]azardous and toxic constituents" are present in their groundwater: benzene, toluene and xylene. Complaint ¶ 32. These three substances are indigenous components of crude oil. *Wilshire Westwood Assocs.*, 881 F.2d at 803 (taking judicial notice thereof); *see* STI Report at 4 (describing benzene, toluene and xylene as gasoline

[17] Noonan argues that the plaintiffs fail to assert subject matter jurisdiction for their CERCLA claims. Yet, the plaintiffs cite 42 U.S.C. § 9613(b) ("the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA]"), and 28 U.S.C. § 1331, both of which provide subject matter jurisdiction over the plaintiffs' CERCLA response costs claims. *See United States v. Kramer*, 757 F. Supp. 397, 437 (D.N.J. 1991) (in suit to recover response costs under 42 U.S.C. § 9607(a), plaintiff properly alleged subject matter jurisdiction under 42 U.S.C. § 9613(b) and 28 U.S.C. § 1331).

constituents). The plaintiffs do not dispute this, nor do they argue that the substances are present in higher concentrations than would normally occur through the refining process.

The plaintiffs argue, however, that the spilled fuel has become contaminated by other hazardous substances: "Noonan's tractor trailer exploded and was essentially consumed by an intense fire thereby releasing toxic and hazardous materials to the environment and the [plaintiffs'] soil and groundwater." Plaintiffs' Objection at 8. If these materials constitute "hazardous substances" as defined in 42 U.S.C. § 9601(14),[18] then the mixture does not fall within the petroleum exclusion.[19] The defendants respond that the complaint does not sufficiently identify these "toxic and hazardous materials."

Despite the deference accorded to factual allegations in the Rule 12(b)(6) context, courts do not accept a plaintiff's "unsupported conclusions or interpretations of law" on a motion to dismiss. *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993). Here, the plaintiffs' allegation that the fire released hazardous substances, without naming them, is merely a legal conclusion. Other courts have required plaintiffs to specify the allegedly hazardous substances in CERCLA and RCRA claims. *See Barnes Landfill, Inc. v. Highland*, 802 F. Supp. 1087, 1088 (S.D.N.Y. 1992) (CERCLA claim that did not specify names of alleged hazardous

[18] CERCLA's hazardous substance definition incorporates particular substances designated by the Administrator of the EPA. 42 U.S.C. § 9601(14).

[19] Brunswick and Downeast argue that, since they did not cause the fire, their discharge must fall within the petroleum exclusion. Downeast Energy Corporation/Brunswick Coal & Lumber Company's Reply to Plaintiffs' Objection to Defendant's Motion to Dismiss (Docket No. 9) at 2. Given that the parties provide neither legal authority nor developed argumentation on this issue, they should reargue the issue in greater depth if the plaintiffs seek and are granted leave to amend their complaint by identifying the particular "toxic and hazardous materials" alleged to have mixed with the petroleum.

substances, or costs attributable to cleanup of hazardous substances, was dismissed for vagueness); *Brewer v. Ravan*, 680 F. Supp. 1176, 1182 (M.D. Tenn. 1988) (complaint that did not identify particular hazardous wastes that defendant allegedly dumped, or circumstances of alleged dumping, merely stated legal conclusion and thus failed to state RCRA claim). Accordingly, I recommend that Count IV be dismissed, without prejudice to any timely request the plaintiffs may make for leave to amend their complaint to specify the unnamed hazardous substances.

D. Count I (Declaratory Judgment)

"A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948); *see El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 493 (1st Cir. 1992) ("declaratory relief, both by its very nature and under the plain language of 28 U.S.C. § 2201, is discretionary"). The defendants ask that the court, in its discretion, decline to issue a declaratory judgment. They argue that declaratory relief is intended to prevent the accrual of avoidable damages, and thus would be of no effect here because the alleged damage is already done. They also claim that the remedies available to the plaintiffs in this action obviate the need for declaratory relief.

Although the plaintiffs' past cleanup costs have already been incurred, they may incur future costs as well. A declaratory judgment could determine that the defendants are liable for such costs. "Numerous courts have entertained claims for declaratory judgment as to liability for future response costs under section 9607 of CERCLA." *Arawana Mills Co. v. United Technologies Corp.*, 795 F. Supp. 1238, 1247 (D. Conn. 1992); *see, e.g.*, *Cadillac Fairview/California v. Dow Chemical Co.*, 840 F.2d 691, 696 (9th Cir. 1988) (claim for declaratory judgment that defendant was solely liable

under CERCLA was ripe); *Prisco v. State of New York*, 902 F. Supp. 374, 392 (S.D.N.Y. 1995) (granting plaintiffs' request for declaratory relief as to future CERCLA response costs). To the extent that aspects of the requested declaratory judgment may duplicate remedies otherwise available in this action, or are arguably inappropriate, the defendants may raise such issues at a later stage in the litigation. Accordingly, I recommend that the court exercise its discretion and entertain the plaintiffs' declaratory judgment claims.[20]

E. Defendant Noonan's Motion to Strike Jury Demand

Noonan moves to strike the plaintiffs' demand for a jury trial on their federal claims, Counts I through V. The plaintiffs offer no authority to support their asserted right to a jury trial on their declaratory judgment, RCRA and CERCLA claims. The extent of the plaintiffs' argument against Noonan's motion to strike is as follows: "The [plaintiffs] object to Defendant Noonan's Motion to the extent of any triable factual issues, reassert their jury demand and request this Court for the reasons articulated above, try the state and federal claims together in a combined bench and jury trial." Plaintiffs' Objection at 20 n.12. As courts have uniformly held, there is no right to a jury trial on the plaintiffs' CERCLA and RCRA claims.[21] The plaintiffs seek only injunctive relief in their

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[20] As the defendants concede, their subject matter jurisdiction challenge fails if any of the plaintiffs' federal claims survive the motions to dismiss.

[21] *Hatco Corp v. W.R. Grace & Co.--Conn.*, 59 F.3d 400, 414 (3d Cir. 1995) (no right to jury trial on CERCLA claims under 42 U.S.C. §§ 9607(a), 9613); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986) (no right to jury trial on government's claim for CERCLA response costs and RCRA abatement costs), *cert. denied*, 484 U.S. 848 (1987); *Dublin Scarboro Improvement Ass'n v. Harford County*, 678 F. Supp. 129, 132 (D. Md. 1988) (no right to jury trial on RCRA and CERCLA claims); *United States v. Dickerson*, 640 F. Supp. 448, 453 (D. Md. 1986) (no right to jury trial on CERCLA response cost claim under 42 (continued...)

CWA claims, Complaint ¶¶ 61-62, and thus have no right to a jury trial on Count II. *See Rodriguez v. Munoz*, 808 F.2d 138, 142-43 (1st Cir. 1986) (no right to jury trial on claim purely for injunctive relief unless expressly provided by statute). To the extent that the plaintiffs may have been entitled to a jury trial on their declaratory judgment claims,[22] I treat them as having waived any objection on those grounds. *See United Transp. Union v. Maine Cent. R.R.*, 117 F.R.D. 482, 485 (D. Me. 1987) ("under Local Rule 19(c) a satisfactory memorandum in opposition to a motion is supposed to focus the issues and provide guidance in their resolution"); Local R. 19(c) (failure to file opposition to motion and accompanying memorandum of law constitutes waiver of objection). Accordingly, I grant Noonan's motion to strike the plaintiffs' demand for a jury trial on their federal claims (Counts I through V).

F. Counts VI through XXI (State-Law Claims)

The defendants argue that this court should not exercise supplemental jurisdiction over the plaintiffs' state-law claims because they do not arise from a common nucleus of operative fact,[23] they

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[21] (...continued)
U.S.C. § 9607).

[22] "[T]o determine whether there is a right to a jury trial in a declaratory judgment action, first it is necessary to determine in what kind of an action the issue would have come to the court if there were no declaratory judgment procedure." 9 Wright & Miller § 2313 at 109.

[23] The defendants do not argue that the claims are not "part of the same case or controversy," 28 U.S.C. § 1367(a), i.e., that this court simply lacks subject matter jurisdiction over the claims. They merely argue that, if any federal claims survive, the court should decline to exercise supplemental jurisdiction. *See* J.P. Noonan Transportation Inc.'s Motion to Dismiss for Failure to State a Claim and Lack of Subject Matter Jurisdiction and Memorandum of Law in Support Thereof (Docket No. 4) at 17-20; Downeast Energy Corporation/Brunswick Coal & Lumber Company's Motion to Dismiss (Docket No. 5) at 13.

involve multiple different elements and remedies than the federal claims, state-law questions will substantially predominate over the federal claims, and there is a substantial risk of jury confusion.

The state-law claims, though numerous, do not present strikingly novel or complex issues.[24] "Moreover, this court, sitting in Maine and being familiar with Maine law, is competent to make a determination based on Maine law whether the plaintiffs may assert specific claims under state law. As for the scope of relief available under Maine law, the fact that the remedies available on the state claims differ from those available on the federal claims does not mean that the state claims substantially predominate over the federal claims." *Murray*, 867 F. Supp. at 47 (citations omitted) (court with jurisdiction over RCRA, CWA and CERCLA claims exercised supplemental jurisdiction over state-law claims for trespass, private nuisance, ultrahazardous activity, negligence and failure to warn). "Finally, to the extent that the state claims involve issues triable to a jury, whereas the . . . federal claims do not, . . . resolution of the nonjury federal issues may be easily directed to the court after the presentation of the entire case without likely causing juror confusion." *Id.* Accordingly, in the interests of judicial economy, convenience and fairness, I recommend that the court retain supplemental jurisdiction over the plaintiffs' state-law claims.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motions to dismiss be ***GRANTED*** as follows: Count II (CWA) dismissed; Count III (RCRA) dismissed in full as against

[24] The plaintiffs' state-law claims are for negligence (Counts VI, VII), negligence *per se* (Count XXI), strict liability for ultrahazardous activity (Counts VIII, IX), continuing trespass (Counts X, XI), nuisance (Counts XII, XIII), negligent infliction of emotional harm (Counts XIV, XV) punitive damages (Count XVI), intentional misrepresentation (Counts XVII, XVIII) and negligent misrepresentation (Counts XIX, XX). Complaint ¶¶ 88-156.

Brunswick and Downeast, and dismissed against Noonan except insofar as it seeks injunctive relief pursuant to 42 U.S.C. § 6972(a)(1)(A) and (B); Count IV (CERCLA) dismissed except insofar as it seeks cost recovery and equitable restitution (but excluding natural resources damages) pursuant to 42 U.S.C. § 9607(a), and dismissed in full without prejudice to a timely request for leave to amend to specify hazardous substances; and Count V (CERCLA) dismissed. I recommend that the defendants' motions to dismiss be ***DENIED*** in all other respects. Noonan's motion to strike the plaintiffs' jury demand on the federal claims is ***GRANTED*** as to Counts I, III and IV, and as to Counts II and V if and to the extent that the court declines to dismiss these counts pursuant to my recommendation.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 19th day of April, 1996.

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David M. Cohen
United States Magistrate Judge